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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 49

EDWARD MISHKIN,

Appellant,

against

STATE OF NEW YORK,

Appellee.

PETITION FOR REHEARING

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TABLE OF CONTENTS

PAGE

Reasons for Granting Rehearing 1

Search and Seizure 2

The Due Process Question 11

Appendix 15

Table of Cases

A Quantity of Books v. Kansas, 378 U. S. 205 ...... 2, 10

Bantam Books v. Sullivan 10

Boyd v. United States, 116 U. S. 616 10

Cole v. Arkansas 12

Kremer v. United States, 353 U. S. 346 .... 2, 10

Lanzetta v. New Jersey, 306 U. S. 451 12

Marcus v. Search Warrants of Property, etc., 367 U. S. 717 .... 2, 10

People v. Brooklyn New Co., 12 Misc. 2d 768 13

People v. Coffey, 11 N. Y. 2d 142 3

People v. Loria, 10 N. Y. 2d 368 3

Stanford, Jr. v. Texas, 13 L. ed. 2d 431 (January 18, 1965) 2

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PETITION FOR REHEARING

Appellant, Edward Mishkin, prays that this court grant a rehearing of its judgment of March 21, 1966, affirming the judgment of conviction of the appellant.

Reasons for Granting Rehearing

The reasons are:

1. The court in the appellant's contentions with respect to the contentions illegal search and seizure, the events that transpired in this court *after* argument was had on December 6, 1965.

2. As to the argument concerning illegal search and seizure, the court overlooked arguments with respect to the facts in the record.

3. The court did not pass upon appellant's contention that the trial court in making a construction of the statute for the first time in *this* case (a construction contrary to its legislative history), deprived appellant of due process.

Search and Seizure

The seizures were made without a lawful or adequate warrant. This was clearly established *after* argument in this court on December 6, 1965. During the week of December 10, 1965, Mr. Michael Rodak, Jr., deputy clerk of this court, communicated with counsel for the appellee, requesting a copy of the search warrant alleged to have been authority for the seizure of the books involved. On December 21, 1965, the district attorney wrote to Mr. Rodak, enclosing a copy of the warrant and a copy of the inventory made. The above information is taken from copies of the correspondence sent to appellant's counsel on December 28, 1965. Therefore, for the first time, so far as appellant and all the courts concerned, knowledge of the contents of the warrant was obtained. The warrant and inventory are before the court.

The statement in the opinion that "the warrant itself is [not] in the record is an oversight, unless, "record" excludes what Mr. Rodak obtained.

A reading of the warrant immediately shows that it is defective and is condemned by the decisions of this court in *Stanford, Jr.* v. *Texas,* 13 L. ed. 2d 431 (January 18, 1965); *A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Marcus* v. *Search Warrants of Property, etc.,* 367 U. S. 717; and *Kremen* v. *United States,* 353 U. S. 346.

The warrant directs the police to search in the day-time or night-time of the person and premises of Norman Levenberg (the agent of appellant) and of Edward Mishkin for books, records, equipment for printing "obscene literature", including payroll records.

A better example of a general warrant could hardly be imagined. Such a warrant is condemned not only by the Fourth Amendment, but is also violative of the First Amendment, for its language leaves to the police to determine what is "obscene literature" and enables the police to ransack and clean out a publishing establishment.

An analysis of the inventory of property seized accompanying the warrant, clarifies the record sufficiently to justify the resolution of this question. In any event, the New York Court of Appeals in illegal search issues tendered with respect to cases tried but not final through appeal before this court's decision in *Mapp* remanded cases of factual doubt for a hearing. *People* v. *Coffey,* 11 N. Y. 2d 142; *People* v. *Loria,* 10 N. Y. 2d 368. This was only fair, because New York was operating under a non-exclusionary rule, and hence all questions on the method of seizure were irrelevant and unmaterial. Trial counsel for Mishkin in this case was confronted with that rule. He nevertheless interposed his objections. It is surprising that he was able to extract as much as the record shows.

Under the circumstances, it would be only fair—assuming this court still has any doubts—to remand for a hearing on this issue. Certainly, a person facing a shocking three year sentence for selling books should be accorded the consideration given to pickpockets, gunmen and burglars.

But the illegality of the seizure at the premises of Norman Levenberg, appellant's agent, is made plain:

Each one of the books that appear in the Appendix to the court's opinion, numbered Exhibit 1 through 32, plus 10 others and comprising the counts correlated to those exhibits were therefore seized under this warrant, illegal both under the First and Fourth Amendments (R. 137).. This is very important because the appellant was sentenced to consecutive terms of imprisonment of one year respectively under Exhibit 1 (counts 1, 111) "Chances Go Round", Exhibits 20 and 54 (count 48) "Pleasure Parade No. 1", and Exhibit 3 (count 65) "Female Sultan" (R. 718, 719).

An appendix to this brief shows the exhibit titles with their corresponding number in the seizure inventory.

The seizures under this warrant were made on January 12, 1960 at 37 West 20th Street, New York City (R. 133). What was 37 West 20th Street where the warrant was executed? The record shows that its premises rented to the defendant and whose place of business it was as a warehouse. The appellee's own witness Norman Levenberg so testified:

(R. 183):

> "Justice Gassman: Tell me, where was the warehouse? You speak about the balance of the books being sent to the warehouse. Where was that?
>
> The Witness: Well, there's two. I had two warehouses for him.
>
> Justice Gassman: You mean your warehouses?
>
> The Witness: They weren't mine—my warehouses; *they were his warehouses.* (emphasis supplied)
>
> Mr. Stein: I wanted to develop that rather fully, Your Honor.
>
> Justice Gassman: I beg your pardon?
>
> Mr. Stein: I wanted to develop that fully at a different time.
>
> Justice Gassman: I mean why not finish with it once you speak about it, so we can get to it and not get lost later on. Where were the warehouses?
>
> The Witness: The first warehouse that I got *for him* was at 44 West 17th Street. It was a basement warehouse. And—"

(R. 185):

"Q. Tell us what happened. A. Well, I went up; and I got—I got a warehouse in the same building I had my shop.

Q. Is this 37 West 20th Street? A. 37 West 20th Street.

Q. And that was approximately the middle of what year, sir? A. Middle of '58.

Q. And did you enter into any arrangement with Mr. Mishkin for the maintenance of that warehouse? A. At the beginning of every month *Mr. Mishkin would give me one hundred dollars cash, which I would pay to the landlord.*" (emphasis supplied)

"Q. What did Mr. Mishkin tell you to do about that warehouse? A. He told me to put the books in there.

Q. Books which you would have printed for him, is that correct? A. That's right.

Q. And you previously testified when you ran off the printing you would deliver approximately fifty to Publishers Outlet, is that correct? A. And fifty to the little book shop.

Q. What's the name of the little book shop? A. Midget Book Shop.

Q. Midget. And the rest you would store in one of these two warehouses, is that correct? A. Right."

(R. 188):

"Q. Now, is there anything else that you can tell this court concerning the arrangements that you and Mr. Mishkin had entered into for the maintenance of the warehouse or the care of books therein? A. Well, originally, Mr. Mishkin had another fellow taking care of the warehouse for him. In other words, I would just move the books from the binder into the warehouse, and my job was done. I would get paid, and

> that was it. And some other fellow would take care of the warehouse for him. But in—I am trying to think of dates now. At one time I told Mr. Mishkin, who had never been up into this warehouse, I wanted him to take a look at that warehouse; I just wanted him up there to take a look at it. Mr. Mishkin came up there; and upon looking at the warehouse, he fired the man that was taking care of it for him and he asked me to take over that fellow's job until he could get somebody else to fill the orders for him.''

(R. 341):

> ''Q. Isn't it a fact, Mr. Levenberg, that all of those books down in the basement which were taken by the police on January 12, 1960, were your own personal property— A. Definitely not.
>
> Q. —kept in your own storeroom down in that building? A. Definitely not.''

Thus, the place where the seizures were made were the premises of Mishkin, for which he paid and which were under his control. Levenberg merely acted as his amanuensis.

The record makes clear that Levenberg did not voluntarily part with the articles. Levenberg, appellee's witness, testified that he yielded the books to the police because of the color of their office (R. 336-339):

> ''Q. How long after that? A. Well, after I decided to cooperate I told them to pick up the books.
>
> Q. All right. It was about the middle of January you said, about January 15th, that you told Inspector Plansker you were going to cooperate? Now, how long after that day was it when you told him you were going to cooperate did they go down to 37 West 20th Street and did you see them down in the basement removing the books? A. An hour or two later.

> Q. On that day? A. On that day.
>
> Q. Well, it was the 12th of January when they seized the books? A. What did I say?—January—?
>
> Q. The 15th. A. I am sorry."

Surrender to the authority of the law is not a voluntary act. *Johnson* v. *United States,* 333 U. S. 10. Here, there was both the color of office presented by the police, four in number (R. 153) as well as the coercion of the warrant (R. 304).

So any doubt as to whether Levenberg acted voluntarily ceases.

Likewise, Levenberg made clear that the books were in the basement for immediate and early dissemination (R. 186, 189).

(R. 189):

> "Q. When you took over the fellow's job, what did that entail? A. It meant filling the orders.
>
> Q. Filling the orders for what?
>
> Justice Galloway: For the books, wasn't it?
>
> The Witness: For the books, yeah. For the books.
>
> Justice Galloway: Where would you get these requisitions from for the books?
>
> The Witness: Mr. Mishkin would have me come down to the store, and he would give me a slip of paper with the books written down on it.
>
> Q. What would be done? A. I would go up to the warehouse and fill out the order accordingly."

There could not be a waiver of Mishkin's rights by his agent, for this court said only recently in *Stanford, Jr.* v. *Texas,* 13 L. ed, 2d 431, that even a wife could not waive consent to an illegal seizure. Levenberg was not a joint owner with Mishkin as the appellee would like to spell out.

Levenberg's testimony on behalf of the appellee makes clear that the premises were those of Mishkin, the books were those of Mishkin and they were all subject to the direction of Mishkin. The appellee brought out this evidence for the purpose of implicating Mishkin as the entrepreneur. It could not now, after *Mapp,* put a new gloss on his ownership and control.

And in connection with this problem it should be remembered that the evidence seized at 37 West 20th Street was admitted subject to the production of the warrant (R. 136).

Thus, aside from appellant's contentions under the First Amendment, so far as Exhibits 1 through 42 are concerned, there was a violation under the Fourth Amendment. That question was certified to this court by the Court of Appeals.

As to the argument under the First Amendment: the seizure of books at 20th Street was 17, 121 volumes which took two days to remove (R. 139, 137). The court's opinion stresses that the absence in the record of any indication of the total volumes in the warehouse does not present a First Amendment problem. The answer is twofold. The appellee's police witness testified in so many words that he cleaned out the place. Levenberg testified that the police seized all the books in the basement (R. 353). Therefore, the 17,121 copies comprised the total that were there. The warrant directed him to take out "obscene literature". He took those 17,121 and made an inventory of them. That alone should show that he took 100% of what was stored. The second point is that even if 17,000 volumes were taken out of 170,000 volumes there, the First Amendment would have been offended. How much more shocking can it be for 17,000 volumes to be hauled off from a publisher, especially under a general warrant with no specification of books to be seized, and with the within interpretation left to the police of what is obscene.

In such a case, surely, the First and Fourth Amendments merge. They can hardly be separated for treatment.

It is respectfully submitted that in the light of the warrant now before the court and the other matters here elucidated, there was a violation of at least the Fourth Amendment. And if there is any doubt about any of the matters, they should be remanded for a hearing since this case was tried before the *Mapp* decision.

As to the remaining exhibits that appear in the opinion Appendix as exhibit numbers 43 through 71, the Fourth and First Amendments were violated as follows:

Not one of the books seized was purchased by a policeman, except exhibit 72 purchased in August 1958, a year before all the other seizures (R. 164).

The seizures of the books at the Publishers Outlet Store was made concededly (R. 153) without a warrant on December 29, 1959 (R. 143-144). These exhibits 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67. A substantial quantity of each title was on the shelves of the book store. The prosecution in order to establish Mishkin as the principal and owner of the Publishers Outlet Store produced witnesses and documentary proof to that effect (R. 179, 531, 548, 561, 562, 654, 693). Under these circumstances the seizure of the books was a violation of the Fourth Amendment. Objection to their admission was made (R. 153-154). The appellee has sought to except itself from the force of that Amendment by contending that the books were on the open shelves. The effect of that contention is that the police are free to seize without a warrant if the articles are not concealed. In making this argument the appellee equates books with ordinary contraband. But in doing so, the appellee forgets that this court has spoken against such attempts, because books are not contraband, *per se.* To do so, would permit a policeman to establish in advance, without a warrant, what books are obscene,—all contrary to what this court announced in the *Marcus* v. *Search Warrants, Bantam Books* v. *Sullivan, Kremen* v. *United States, A Quantity of Books* v. *Kansas* and *Boyd* v. *United States,* 116 U. S. 616.

As to the appellee's argument that the search is free from attack because the search was accompanied by an arrest, the answer is that as early as the *Boyd* case it was held that a search cannot be made for the purpose of obtaining evidence to arrest.

Since the court found no lack of clarity as to Mishkin's interest in the Publishers Outlet Store, there was an evident oversight in this court's consideration of Exhibits 43-67. It is submitted, however, that those books were unlawfully seized in violation of appellant's constitutional rights.

Exhibit 68 was seized at Midget Book Store on December 29, 1959 (R. 151). No purchase was made. No warrant was obtained (R. 153) and objection to its admission was made (R. 153-154). Exhibits 69, 70, 71 were seized at The Main Stem Book Store on February 10, 1960. Several copies of each title were seized (R. 153). No purchase was made. No warrant was obtained. Objection to their admission was made (R. 153-154). The answers given above by appellant to arguments of appellee with respect to the Publishers Outlet Store, that the illegal searches may be justified, apply also to the seizures at the Midget Book Store and The Main Stem Book Store.

Although ownership or control of Midget Book Store is not clear in the record, as the court's opinion indicates, nevertheless, there was evidence produced by the appellee to show Mishkin's control of The Main Stem Book Store

(R. 191, 617-619, 624, 626-629, 630, 633, 637). Accordingly, it becomes clear that the seizures were made with prejudice to Mishkin's constitutional rights.

As to the Midget Book Store, the answer is that if there is doubt in the record, it was not of appellant's doing. It was the state of the law in New York before *Mapp* that is responsible. In the interest of justice, therefore, the case should be sent back for a hearing.

The Court noted that there is no finding as to the extent and nature of Mishkin's interest in the latter two stores. Again, because of the state of the law at the time, such findings were not made or adequately explored.

The conclusion as to the issue of illegal search and seizure is that Mishkin's constitutional rights as to Exhibits 1-42 were certainly violated, what with the warrant and inventory now in the possession of the court. As to Exhibits 43-67 there was an oversight in disposing of this issue, because the facts and findings with respect to them were adequately established by the record. As to Exhibits 68-71, whatever doubt that may remain, should be clarified by a hearing.

The Due Process Question

The court made no observation with respect to the due process question raised by appellant and therefore may have overlooked appellant's contentions. Appellant argued (Brief for Appellant, p. 11) that if the statute, Section 1141 were construed for the first time through this case to render "sadism" and "masochism" as synonymous with "obscenity", especially in the face of its legislative history to the contrary (Brief, p. 7), then due process is not being accorded to appellant.

The court's opinion states that the New York courts held in this case that the terms "sadistic" and "masochistic" as well as other adjectives used in Section 1141 to describe proscribed books, are "synonymous with "obscene", citing this case 26 Misc. 2d at 154.

Aside from what we will demonstrate that the conclusion is not justified, there still remains the question, doesn't fairness dictate that this appellant be absolved from liability for a construction made for the first time in this case and made against its legislative history. Mishkin could not have known in advance that the statute included him, especially when its legislative history was to the contrary. To all appearances it seems that the violence done to the history of the legislation by the trial court was done to catch him within a protean construction of the law. Since he couldn't have known that his acts fell within its scope, he should not be held responsible now. *Lanzetta* v. *New Jersey,* 306 U. S. 451.

This due process question bothered this court in the *Winters* case and has not been resolved. It should have been resolved here because three years of imprisonment have been meted out to Mishkin in First Amendment areas. In *Winters* this question so troubled this court that when it set the case for reargument, it ordered counsel to argue this very question. The order appears in 91 L. ed. 1873 and its text at page 12 of appellant's brief. The court did not decide the question in *Winters* because its decision rested on the *assumption* that he was chargeable with knowledge of subsequent construction *Winters* page 514, citing the *Lanzetta* case. See, *Cole* v. *Arkansas,* 333 U. S. 196.

Under the circumstances, it is respectfully urged that the court consider this plea of denial of due process.

Aside from the aforesaid plea that the court consider and pass upon the due process argument, there also remains the question whether this court was bound by the construction placed upon the statute by the trial court.

While it may be an idle gesture to dwell on this, at this time, it nevertheless evokes a serious and sincere inquiry. How could this court be bound by a construction of a statute made by a trial court? True, this court in *Winters* held that the construction made by the *highest* court in the sate—the court to which the present appeal is directed—was entitled to the same dignity as if the words had been inserted by the legislature. But that was the highest court of the state! How can it be said that the words of a court in the lowest rung of the judicial structure, as here, may make pronouncements that shall be equated with the text of the legislature.

The trial court's judgment was affirmed by the Appellate Division, and that in turn by the Court of Appeals. They affirmed the judgment, but not the opinion of the trial court. Neither of appellate courts said anything concerning the construction of the statute. Can the *silence* of the Court of Appeals be deemed a construction so that it has the force of a textual statement of the law. From the earliest days dating back to the Justinian Code, a compulsion has prevailed that a law be stated so that a person could know what conduct was forbidden. How could silence of the Court of Appeals be deemed such a revelation? Silence could have implied agreement with the judgment below without construing the statute. The Court of Appeals may have been satisfied that the judgment of the Trial Court was correct on a determination, that the books fell within the scope of the obscenity statute (since the Information also charged him with "obscene" literature), without even considering the construction of the terms "sadism" and "masochism". To infer a construction such as has been accepted by this court is speculative. The cases cited by appellee in its Brief, page 57 are not cases in which a construction was deemed made by *silence*.

Nor did *People* v. *Brooklyn News Co.*, 12 Misc. 2d 768, construe the statute to apprise anyone that the terms were synonymous with "obscene." Even if any judicial significance were to attach to the pronouncements of an inferior court as equal to the text of a legislature, the plain fact is that the single Trial Judge in that case made no explicit construction of the statute. Therefore, no one could learn from that case what the state of the law was at that time.

Irrespective however of what consideration this court gives to the words argued here that too much dignity was granted to a construction made diametrically opposed to its legislative history, nevertheless, there is still open for decision the question raised: granted such a construction is accepted, has due process been accorded to Mishkin or was he used as a guinea pig to supply the deficiencies of the statute? Was the statute construed to snare him?

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant.

APPENDIX

Exhibit No.	*Title of Book*	*Inventory Warrant Item No.*
1	Chances Go Round	16
2	Impact	12
3	Female Sultan	26
4	Satin Satellite	6
5	Her Highness	1
6	Mistress of Leather	61
7	Educating Edna	64
8	Strange Passions	24
9	The Whipping Chorus Girls	60
10	Order Of The Day and Bound Maritally	31
11	Dance With The Dominant Whip	15
12	Cult Of The Spankers	65
13	Confessions	49
14 & 46	The House of Torture (opinion has typographical error)	32
15 & 47	Bound in Rubber	38
16 & 48	Arduous Figure Training at Bondhaven	55
17 & 49	Return Visit to Fetterland	54
18	Fearful Ordeal in Restraintland	25
19 & 50	Women In Distress	56
20 & 54	Pleasure Parade No. 1	14
21 & 57	Screaming Flesh	62
22 & 58	Fury	7
23	So Firm So Fully Packed	34
24	I'll Try Anything Twice	63
25 & 59	Masque	10
26	Catanis	45
27	The Violated Wrestler	5
28	Betrayal	20
29	Swiss Bottom	23
30	Raw Dames	9
31	The Strap Returns	78
32	Dangerous Years	47